



**THE ATTORNEY GENERAL  
OF TEXAS**

GERALD C. MANN  
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ATTORNEY GENERAL

AUSTIN 11, TEXAS

Honorable Marvin H. Brown, Jr.  
Criminal District Attorney  
Fort Worth, Texas

Dear Sir:

Attention: Austin F. Anderson  
Opinion No. 0-1936  
Re: Suspended Sentence Law

We are in receipt of your letter of February 3, 1940, seeking this department's opinion upon the following state of facts, which are taken from your letter:

"On the 28th day of October, 1937, Homer Dodd was convicted in the Criminal District Court of Tarrant County, Texas, in cause number 40132 for the offense of burglary upon his plea of guilty and was given a sentence of two years in the penitentiary, which was by the court suspended during the defendant's good behavior. On the same day, said defendant was released upon his own recognizance.

"Thereafter, on the 14th day March, 1939, and while said suspended sentence was still in effect, said defendant was convicted in the United States District Court for the Northern District of Texas, Fort Worth Division, in cause number 7221, criminal, under the name of George Homer Dodd upon his plea of guilty entered therein on the 14th day of March, 1939, to certain charges in an indictment returned in said cause charging violation of the United States Code, Title 12, section 588-b, in which judgment of the court was that said defendant be imprisoned in an institution of the penitentiary type for thirteen months. George Homer Dodd, said defendant, in both of the above causes, was delivered to the warden of the United States Penitentiary at Leavenworth, Kansas, by J. R. Wright, United States Marshal for the Northern District of Texas, on the 27th day of March, 1939, where he is still detained under said sentence.

"On the 24th day of March, 1939, there was issued out of the Criminal District Court of Tarrant County, Texas, in said cause number 40132, an alias capias ordering the body of said Homer Dodd to be brought before the Honorable District Court in and for said Tarrant County for the purpose of having a sentence pronounced upon the original judgment of conviction in said cause."

It is further made to appear that the alias capias was not served and the said Homer Dodd was not sentenced by the court on his original conviction during the time assessed as punishment in the case, and for which punishment he received a suspended sentence.

The question propounded by you to this department is whether or not the State court has the power, after the expiration of the time assessed as punishment in that court, to revoke the suspended sentence and sentence defendant to serve the time for which he received a suspended sentence, where he was again convicted of a felony during the period of his suspended sentence.

We do not regard the above question to be an open one in the State. The Court of Criminal Appeals has passed upon the question in the case of *Clare v. State*, 54 S.W. (2) 127. The court in this case reached the conclusion that the trial court does not have the power, after the suspended term has ended, to revoke the suspended sentence, and sentence the defendant to serve the sentence in the penitentiary. We quote from Chief Justice Morrow's opinion in the above case:

"It is understood that the suspension of the sentence of one convicted of crime is not, in the absence of statutory authority, one of the inherent powers of the trial judge. See *State of Utah v. Zolantakis*, 70 Utah, 296, 259 P. 1044, 54 A.L.R. 1463, and authorities cited in notes on page 1471 of 54 A.L.R.

"In this state the subject is covered by statute and limited thereby. That is to say, that the accused, at any time after the term of his conviction has expired, may, upon showing that he has not been subsequently convicted, be released from the suspended sentence by an order of the court. Likewise, if within the period of his conviction under a suspended sentence he is again convicted of a felony, the court has

authority to recall the suspended sentence and make the judgment final. See articles 779 and 780, C.C.P. The time within which the court may act is limited only by the duration of the sentence. That is to say, after the time for which one is convicted and placed under a suspended sentence has expired, it is not within the power of the court to recall the suspension and make the judgment final. This was held in the case of *Ex parte Coots*, 85 Tex. Cr. R. 334, 212 S.W. 173. So far as we are aware, there are no other limitations upon the right of the court to recall the sentence. In the present instance, the recall of the suspended sentence was within the duration of the conviction, and therefore was within the jurisdiction of the trial court."

It is doubtless true that this holding of Judge Morrow was not absolutely necessary to a disposition of this case, since the defendant there had been convicted of a second felony and his original suspended sentence forfeited, and defendant sentenced during the term the sentence was suspended on the first conviction. Nevertheless, we cannot agree that the holding was under such circumstances as to render it purely dicta. It appears that Judge Calhoun, a Commissioner of the court, had written the original opinion, and had held that the court had the power during the term of the suspended sentence to sentence the defendant, where he was again convicted upon another felony during the term of the suspended sentence. Judge Morrow's opinion was delivered upon motion for rehearing and takes occasion to discuss the power of the court to sentence one under the suspended sentence statute after the term of such suspension had expired, and reached the conclusion that the power was lost after the term of the suspended sentence had expired. The court having expressly passed upon this question, we think it is governed by the rule in the case of *State v. O'Connor*, 73 S.W. 1041, by the Supreme Court, in which Judge Brown had this to say:

"\* \* \* It is claimed that a determination of the question was not necessary to the decision of the *Railway Company v. Jarvis*, and that the opinion in that case is not authority upon the issue as now presented. It is true that the case then before the court might have been disposed of without passing upon the validity of the judgment, but the issue arose upon the facts, and was presented to and decided by the court. It is frequently the case that a court discusses and decides questions presented

which might be emitted in a final determination of the case, but that does not affect the weight of the opinion as authority. We follow the case of Railway Company v. Jarvis, because of its authoritative character, and because we unqualifiedly approve of the conclusion reached by the court upon this question."

Upon the facts submitted by you, and the foregoing authorities, you are advised that in the opinion of this department the court would not now have the power to sentence the defendant.

Very truly yours

ATTORNEY GENERAL OF TEXAS

By s/Grover Sellers  
Grover Sellers  
Assistant

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APPROVED MAR 5, 1940  
s/Gerald C. Mann  
ATTORNEY GENERAL OF TEXAS

APPROVED OPINION COMMITTEE BY s/BWB CHAIRMAN